

- After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes as follows:

jurisdiction in denying claimant's request for benefits. Therefore, the Appeals Board does not have jurisdiction to review the order denying preliminary benefits.

K.S.A. 1997 Supp. 44-551(b) limits the jurisdiction of the Appeals Board. The Appeals Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the Administrative Law Judge exceeded his or her jurisdiction. This includes the specific jurisdictional issues identified in K.S.A. 1997 Supp. 44-534a. A contention that the Administrative Law Judge has erred in his finding that the evidence shows a need for temporary total disability benefits and/or the date those benefits should commence are not arguments the Appeals Board has jurisdiction to consider on an appeal from a preliminary hearing order.

The Appeals Board has held on many occasions that an Administrative Law Judge has the authority at a preliminary hearing to award or not to award temporary total disability benefits and determine the date they should commence. K.S.A. 1997 Supp. 44-551(b) does not grant the Appeals Board jurisdiction at this juncture of the proceeding to review and reweigh the evidence concerning claimant's entitlement to temporary total disability benefits. The claimant may preserve those issues for final award as provided by K.S.A. 1997 Supp. 44-534a(a)(2), which provides:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

Because the Appeals Board does not have jurisdiction to review the denial of preliminary benefits, claimant's request for review of this issue should, therefore, be dismissed.

(2) The portion of the preliminary hearing order that denies claimant's application for penalties is, however, a final order that the Appeals Board has jurisdiction to review under K.S.A. 1997 Supp. 44-551 because it is a final order and not a preliminary order. See Waln v. Clarkson Constr. Co., 18 Kan. App. 2d 729, 861 P.2d 1355 (1993) and Stout v. Stixon Petroleum, 17 Kan. App. 2d 195, 836 P.2d 1185, *rev. denied* 251 Kan. 942 (1992).

In Hatfield v. Wal-Mart Stores, Inc., 14 Kan. App. 2d 193, 196-197, 786 P.2d 618 (1990) the Court said that "[t]he overriding purpose of the Workers Compensation Act is to secure prompt payment to injured employees of the benefits provided for under its terms."

K.S.A. 44-512a "is the means by which the legislature intended all compensation due and payable should be enforced" Kissick v. Salina Manufacturing Co., Inc., 204 Kan. 849, 856, 466 P.2d 344 (1970). K.S.A. 44-512a(a) provides in pertinent part:

In the event any compensation . . . which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due

. . . .

In support of her application for penalties, claimant relies upon the June 11, 1997, Order entered by Administrative Law Judge Benedict. That order provided in pertinent part that "[t]emporary total disability benefits are ordered paid, at the rate of \$285.93 a week, if the authorized treating physician writes that the Claimant is completely unable to work." The Administrative Law Judge, in his Order of March 6, 1998, found that the records and correspondence from Dr. Sterling B. Mutz were confusing and contradictory on the question of whether claimant was entitled to temporary total disability benefits. The Administrative Law Judge went on to hold that the evidence did not establish that claimant was incapable of obtaining employment. Accordingly, Judge Benedict determined that the respondent was not under any obligation to provide temporary total disability benefits and, therefore, penalties were denied.

Again, the Administrative Law Judge ordered temporary total disability benefits paid "if the authorized treating physician writes that the Claimant is completely unable to work." Claimant was first seen by Dr. Mutz on August 11, 1997. In a letter dated February 13, 1998, Dr. Mutz opined that "the patient should have remained on temporary total disability from the period of the 31st of March, 1997, to the 11th of August, 1997." But at the time of his examination, Dr. Mutz's opinion was that the claimant was able to work within certain restrictions. It appears that Judge Benedict did not intend for his Order of June 11, 1997, to be applied retroactively. Since Dr. Mutz did not take claimant off work or find her to be temporarily and totally disabled at the time of his first examination of claimant, then the June 11, 1997, Order for temporary total disability benefits did not apply. Judge Benedict specifically found "the actions of the Respondent were entirely reasonable. . . ."

The fact that the Administrative Law Judge did not intend his June 11, 1997, Order to be applied retroactively to the payment of temporary total disability benefits is supported by the transcript of that preliminary hearing where Judge Benedict said:

If, on the other hand, the physician agrees with Dr. Ketchum that the Claimant cannot work at all and she's gonna need an extended period of time in which to heal, then it really is irrelevant whether or not she left her employment or not, so if the physician provides that opinion, then temporary total disability benefits would commence as of that date and also just for information of counsel, if we do get an opinion like that and Ms. Foerster wants to come back before the court, the court would certainly be willing to entertain a request to make that retroactive to April 30th.

Judge Benedict is the best judge of what he intended by his earlier order concerning the payment of temporary total disability benefits and the Board finds no reason to disturb that determination on appeal. The Appeals Board concludes that Judge Benedict did not intend for his Order to be applied retroactively, but instead, for the parties to request another preliminary hearing for a determination of that issue. The Administrative Law Judge's denial of penalties is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order dated March 6, 1998, by Administrative Law Judge Bryce D. Benedict should be, and the same is hereby, affirmed as to the denial of penalties and claimant's appeal from the denial of temporary total disability benefits is dismissed.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
Christopher McCurdy, Wichita, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director